FILIPPINI RANCHING CO.
AND PARIS RANCH

v.

BUREAU OF LAND MANAGEMENT

IBLA 96-150 Decided May 26, 1999

Appeal from a decision of Administrative Law Judge James H. Heffernan, setting aside the Livestock Grazing Management Decision of the Full Force and Effect Final Multiple Use Decision of the Shoshone-Eureka Resource Area Manager, Battle Mountain District Office, Bureau of Land Management, regarding the Cottonwood Allotment. N6-94-27.

Affirmed.

1. Grazing Permits and Licenses: Adjudication--Grazing Permits and Licenses: Appeals--Grazing Permits and Licenses: Hearings--Rules of Practice: Appeals: Burden of Proof

   BLM enjoys broad discretion in determining how to adjudicate and manage grazing privileges. When it issues a decision taking actions affecting the grazing privileges of a livestock permittee, those actions may be regarded as arbitrary, capricious, or inequitable only if they are not supportable on any rational basis, and an appellant seeking relief from such a decision has the burden to establish by a preponderance of the evidence that the decision is unreasonable or improper.

2. Grazing Permits and Licenses: Cancellation or Reduction

   BLM may properly measure utilization in a grazing allotment using the key forage plant method. However, when the case record fails to establish a rational basis for selecting the highest utilized key forage species from each transect in the allotment in developing use pattern maps for the allotment and calculating average weighted utilization, BLM's conclusion that land use planning objectives for utilization were not being met, which was based on those results, must be set aside.

3. Federal Land Policy and Management Act of 1976: Land-Use Planning--Grazing Permits and Licenses: Cancellation or Reduction

   A BLM determination that a land use planning objective to improve 7,952 acres to good condition, and 2,014 acres to excellent condition, in the long term, on a grazing allotment had not been met will be set aside when the case record fails to show any baseline data on ecological condition for any particular acreage in the grazing allotment.

4. Federal Land Policy and Management Act of 1976: Land-Use Planning--Grazing Permits and Licenses: Cancellation or Reduction

   A BLM determination that a land use planning objective to stop downward trend on 10,603 acres, and manage for upward trend on 10,762 acres, in the long term, on a grazing allotment had not been met, based on limited monitoring trend data, will be set aside when the record fails to show a rational basis for failing to apply statistical analysis to that data, as recommended by the Nevada Rangeland Monitoring Handbook, the handbook utilized by BLM in its monitoring program.

5. Federal Land Policy and Management Act of 1976: Land-Use Planning--Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Cancellation or Reduction

   When, in evaluating a grazing allotment, BLM applies an incorrect riparian objective and uses the failure to meet that objective as a basis for closing part of the allotment to livestock grazing, and the case record shows that the proper objective had been met, the closure action will be set aside.

6. Administrative Procedure: Administrative Review--Board of Land Appeals

   While it is true that on numerous occasions the Board has dismissed an appellant's argument as a mere difference of opinion with BLM's experts, it has never been the practice of this Board to accept the conclusory opinions of BLM's experts as a proper basis for a decision in the face of conflicting testimony.

APPEARANCES: David A. Grayson, Esq., Assistant Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for appellant, the Bureau of Land Management; W. Alan Schroeder, Esq., Boise, Idaho, and W.F. Schroeder, Esq., Vale, Oregon, for Filippini Ranching Company and Paris Ranch.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Bureau of Land Management (BLM) has appealed from the December 4, 1995, decision of Administrative Law Judge James H. Heffernan, setting aside the August 29, 1994, Livestock Grazing Management Decision of the Full Force and Effect Final Multiple Use Decision (FMUD), issued by the Shoshone-Eureka Resource Area Manager, Battle Mountain District Office, BLM, regarding the Cottonwood Allotment. Finding that "the measurement of utilization is the heart of the grazing dispute in this case," Judge Heffernan concluded that Filippini Ranching Company (Filippini) and Paris Ranch (Paris) (collectively, the Ranches) established that BLM used "seriously skewed utilization calculations," and that BLM's "resulting final decision was both unreasonable and arbitrary and capricious." (Decision at 7.)

I. Procedural Background

The Area Manager's August 29, 1994, FMUD included three separate decisions: a Livestock Grazing Management Decision, a Wildlife Management Decision, and a Wild Horse Management Decision. The Ranches appealed both the Livestock Grazing Management Decision and the Wild Horse Management Decision. The Hearings Division, Office of Hearings and Appeals, assigned Hearings Division Docket Nos. N6-94-27 and N6-94-28, respectively, to those appeals. Due to different procedural regulations governing grazing appeals and wild horse appeals, the Hearings Division forwarded Hearings Division Docket No. N6-94-28 to this Board where it received Docket No. IBLA 95-113. By order dated May 10, 1995, this Board returned Hearings Division Docket No. N6-94-28 to the Hearings Division stating that, in the interest of administrative economy, "this pending wild horse appeal should be properly consolidated with the related grazing appeal currently pending before the Hearings Division." (Order at 1.) Judge Heffernan dismissed Hearings Division Docket No. N6-94-28 by order dated July 31, 1995. Thus, the decision presently under appeal is Judge Heffernan's resolution of Hearings Division Docket No. N6-94-27, the Livestock Grazing Management Decision of the FMUD.

The Ranches sought dismissal of this appeal by BLM claiming that it was untimely filed. In an order dated March 11, 1996, the Board denied the motion to dismiss, concluding that BLM's notice of appeal had been timely filed on January 8, 1996. 1/ The Board also held that, in accordance with 43 C.F.R. § 4.21(a)(2), Judge Heffernan's decision became effective on the day after the expiration of the 30-day time period for

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1/ In their answer, the Ranches continue to argue that BLM's appeal was untimely filed. In our order denying the Ranches' motion to dismiss, we noted that the day on which the notice of appeal was due, Jan. 3, 1996, was a nonbusiness day because the office in which the appeal was required to be filed, the Hearings Division, Office of Hearings and Appeals, Salt Lake City, Utah, was closed because of a shutdown of the Federal Government due to lack of funding, and that the notice of appeal filed on the first day the office was open, Jan. 8, 1996, was, therefore, timely filed. See Floyd Higgins, 147 IBLA 343, 346-47 (1999). We adhere to that position.

the Ranches to file an appeal because BLM had failed to file a petition for stay of Judge Heffernan's decision. Thereafter, BLM filed a request that the Board reconsider its March 11, 1996, order to the extent it ruled that Judge Heffernan's decision had become effective, and it requested that the Board stay Judge Heffernan's decision. By order dated May 28, 1996, the Board denied BLM's request for reconsideration and denied BLM's request for a stay. On March 16, 1998, BLM filed a motion to expedite consideration of this case. That motion is granted.

II. Factual Background

The Cottonwood Allotment consists of nearly 100,000 acres of public land administered by BLM, as well as private acreage owned or controlled by the Ranches or other private land owners. The allotment is located approximately 40 miles south of Battle Mountain, Nevada. It ranges in elevation from 8,645 feet at the top of Mt. Moses to 4,900 feet in the Antelope Valley. The vegetation in the valley is primarily salt-desert shrub, while the mountains are principally sagebrush and pinion-juniper. Annual precipitation typically ranges from less than 8 inches on the valley floor to 15 inches in the mountains.

BLM established the Cottonwood Allotment in 1985 from the larger Fish Creek Allotment. That same year Filippini, which is owned by Henry Filippini and his wife Marian, purchased the base property to which the grazing privileges in question in the Cottonwood Allotment were attached. (Tr. 883-84.) In 1990, Filippini leased the base property to Paris, owned by Bert Paris and his wife Jill, the Filippini's daughter. The Ranches have been the major users of the allotment with an active preference of 4,780 animal unit months (AUM's) for cattle. Ellison Ranching Company had an active preference of 903 AUM's for sheep. (Ex. N at 6.) Substantial numbers of wild horses had been active in the allotment for a number of years prior to BLM's issuance of the FMUD.

In the FMUD, the Area Manager listed the documents setting forth the management objectives for the Cottonwood Allotment. The Record of Decision for the Shoshone-Eureka Environmental Impact Statement and Resource Management Plan (RMP), issued on March 10, 1986, and a subsequent RMP Record of Decision, issued on November 6, 1987, collectively referred to by the Area Manager as the Land Use Plan (LUP), included some of the objectives. The Rangeland Program Summary (RPS), dated December 1988, identified the remainder of the objectives.

In order to assess progress in meeting the LUP/RPS objectives, BLM undertook an allotment evaluation process to determine if changes in existing management were necessary to meet the objectives. That evaluation process culminated in the issuance of the Cottonwood Allotment Evaluation (Ex. N) in February 1994, the principal author of which was Sara Beetch, who at that time was a Range Management Specialist for BLM. (Ex. O.) The Allotment Evaluation served as the basis for the Area Manager's FMUD.

The Allotment Evaluation does not show actual AUM use totals for Filippini for the years 1986-87, 1987-88, and 1988-89. Instead, it provides "licensed" use for those years of 4,777 AUM's, 4,782 AUM's, and

4,782 AUM's, respectively. For the period March 1, 1989, to February 28, 1990, the actual use is listed as 4,469 AUM's. Actual use for Paris from March 1, 1990, to January 13, 1991, was 3,482 AUM's. For March 1, 1991, to December 15, 1991, Paris is listed as being "licensed" for 3,100 AUM's. For the period March 3, 1992, to November 30, 1992, the evaluation lists actual use by Paris as 3,200 AUM's. The season of use for Paris was from May 1 to February 28, with a total active preference of 4,780 AUM's.

In the FMUD at page 5, the Area Manager stated:

> Through the allotment evaluation process it was determined that the LUP/RPS vegetation objectives were being partially met. The LUP/RPS objectives for ecological condition, livestock use, wildlife, threatened and endangered species, aquatic/riparian, and some of the wild horse objectives have not been met, therefore a change is required to meet all of the LUP/RPS objectives for this allotment.

He announced that "the current authorized active use shall be reduced by 2,462 AUMs for the Paris Ranches (1,931 AUM's suspended non-use and 531 AUMs non-use for conservation and protection purposes)." (FMUD at 10.) 2/

2/ Although the FMUD on page 10 refers to a reduction of "active use," the result reflected in table form on page 11 shows a reduction of "active preference." "Active preference" is not a term defined in the grazing regulations, but is a mixture of two terms: grazing preference and active use. Departmental regulation 43 C.F.R. § 4100.0-5 (1994) defines each of those terms. "Grazing preference" is "the total number of animal unit months of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." In promulgating the grazing regulations that were in effect at the time the FMUD was issued, BLM explained:

"Grazing preference consists of both active use and suspended use. Grazing preference on particular allotments was established pursuant to the Taylor Grazing Act (43 U.S.C. 315 et seq.) based on historic use. It does not change. However, through land use planning and monitoring the authorized officer may identify the need for changes in the preference status or mix of active or suspended use."

53 Fed. Reg. 10227 (Mar. 29, 1988). "Active use" simply means "the current authorized livestock use." 43 C.F.R. § 4100.0-5 (1994). It is equivalent to what is described in the Allotment Evaluation as licensed use. The regulations provide at 43 C.F.R. § 4110.2-2 (1994) that "active use shall be based upon the amount of forage available for livestock grazing established in the land use plan as defined in 43 CFR 1601.0-5(k)." BLM can reduce active use, if necessary to maintain or improve rangeland productivity, when monitoring shows active use is causing an unacceptable level or pattern of utilization or the livestock carrying capacity is being exceeded, unless the authorized officer determines a change in management practices would achieve the management objectives. 43 C.F.R. § 4110.3-2(b) (1994).

He also changed the season of use from May 1 to February 28 to September 1 to February 28. Id. 3/ Further, he closed the "Cottonwood Basin region" to livestock grazing "until the aquatic/riparian objectives have been met, as outlined in the evaluation." Id. at 12. He also provided that ground cover within a 5-mile radius of Hess Spring was to be reestablished and maintained with a minimum 2-inch stubble height. As an additional condition to Paris' grazing permit, the Area Manager imposed an obligation to ride on a regular basis to ensure that cattle were evenly distributed throughout the East and West Units of the allotment and to ensure that livestock were kept off the closed portion of the North Unit in the Cottonwood Basin region. 4/

III. Applicable Law

[1] Section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (1994), authorizes the Secretary, with respect to grazing districts on public lands, to "make such rules and regulations" and to "do any and all things necessary to * * * insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range." Title IV of the Federal Land Policy and Management Act of 1976, which amended the Taylor Grazing Act, reiterates the Federal commitment to protecting and improving Federal rangelands. See 43 U.S.C. §§ 1751-1753 (1994); see also Public Rangelands Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (1994).

Implementation of the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315, 315a-315r (1994), is committed to the discretion of the Secretary of the Interior, through his duly authorized representatives in BLM. West Cow Creek Permittees v. BLM, 142 IBLA 224, 235 (1998); Kelly v. BLM, 131 IBLA 146, 151 (1994); Yardley v. BLM, 123 IBLA 80, 89 (1992). BLM enjoys broad discretion in determining how to manage and adjudicate grazing preferences. Yardley v. BLM, 123 IBLA at 90.

In this case, BLM took a number of actions in the Livestock Grazing Management Decision in the exercise of its administrative discretion, which affected the Ranches' grazing privileges. Those actions have been challenged by the Ranches. Those actions may be regarded as arbitrary,

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3/ He indicated that he undertook the changes based on information provided in the Allotment Evaluation, the technical recommendations of his staff, and the input of the Ranches and other interested parties.

4/ A map included with the Allotment Evaluation (Ex. N, Map 10), provided by Paris to BLM as part of a proposal to divide the allotment by fencing into three pastures to be used on a deferred rotation basis, shows the allotment divided into three units. (Allotment Evaluation at 21; Tr. 1052.) On the map, the northern part of the allotment is designated the North Unit. The southern part of the allotment, containing all the private land, is divided into two units: the West Unit and the East Unit. Although BLM did not accept Paris' proposal, it did adopt the three unit designation for the allotment. (Allotment Evaluation at 25.)

capricious, or inequitable only if they are not supportable on any rational basis. Yardley v. BLM, 123 IBLA at 90; Smith v. BLM, 48 IBLA 385, 393 (1980). An appellant seeking relief from such a decision has the burden to establish by a preponderance of the evidence that the decision is unreasonable or improper. Kelly v. BLM, supra.

IV. Discussion

In reviewing BLM's appeal from Judge Heffernan's decision to set aside the Livestock Grazing Management Decision of the FMUD, we will proceed by reviewing the relevant LUP/RPS objectives, BLM's evaluation of those objectives, the Area Manager's determinations based on those objectives, Judge Heffernan's rulings, and BLM's challenges on appeal to those rulings.

A. Vegetative and Ecological Condition Objectives

1. Utilization Objective

The Allotment Evaluation at page 3 listed three LUP/RPS objectives under the title "Vegetation and Ecological Condition." The first is: "Utilization not to exceed 50% on key species by seed dissemination, and 60% by the end of the grazing year." (FMUD at 3.) 5/ In the FMUD, the Area Manager stated at pages 5-6:

> Average utilization levels on key species were met in the following grazing years: 1989-90 (52%) and in 1990-91 (56%). These levels were not met in the following grazing years: 1985-86 (76%), 1988-89 (62%), and 1991-92 (78%), therefore, this objective has only partially been met.

BLM presented its case at the hearing principally through the testimony of Beetch. 6/ She explained that the technique used by BLM to measure utilization in the Cottonwood Allotment was the key forage plant utilization method, as set forth in the Nevada Rangeland Monitoring Handbook (NRMH) (Ex. ALJ 5) at page 5. Although "utilization" is defined in the applicable regulations as "the percentage of forage that has been consumed by livestock during a specified period and the livestock grazing utilization pattern on the allotment" (43 C.F.R. § 4100.0-5 (1994)), BLM's measurement of utilization, quite naturally, could not distinguish between forage consumed by livestock and forage removed by other sources, such as wild horses and other herbivores. 7/ (Tr. 412.)

5/ Beetch explained that in testing against that objective BLM was looking at the 60 percent figure "[b]ecause we collected monitoring data at the end of the grazing year." (Tr. 614.) Utilization was not measured at the time of seed dissemination.

6/ Beetch began her career with BLM in August 1989 as a graduate research assistant. Following her graduation from Colorado State University in 1991 with a masters degree in Range Science, she became a Rangeland Management Specialist. Her duties included data collection and analysis and preparing allotment evaluations and decisions. (Ex. O.)

7/ BLM amended its grazing regulations in 1995 (see 60 Fed. Reg. (Feb. 22, 1995)), and subsequently. BLM issued the FMUD under consideration in this

In her testimony, Beech explained the method by which BLM collected data in the field. In the Cottonwood Allotment, BLM has identified key plant species in six key areas, as well as at a site designated as the Home Station Gap exclosure. At each key area, BLM placed a utilization cage. The cage kept herbivores from consuming forage, thereby providing information regarding the growth of vegetation without the effect of utilization by herbivores. (Tr. 414.) The exclosure consisted of an area of approximately 1 acre, which was fenced off to serve the same purpose. (Tr. 427, Ex. MM.) Upon traveling to a key area or the exclosure, a BLM employee would observe the vegetation in the cage or exclosure and then walk around to observe the vegetative community and find a location to run a transect, while remaining in that same community. (Tr. 415.)

Beetch explained the running of transects, as follows, at Tr. 416:

> When I begin, I start pacing off and when I stop according to the rangeland -- Nevada rangeland monitoring handbook, I must be looking in 180 degree arch within a five-foot range of where the tip of my foot stops. So I'm walking and I stop and within that 180 degree arch, within five feet, I choose the closest plant of each of the key species and that is the one I look at from the utilization and I determine whether it has had no use or light use or heavy or moderate use.
>
> When I find that plant I make a dot on this form [Range Utilization Key Forage Plant Method (Ex. JJ)]. That constitutes what I call a hit or a point and then the pacing starts again and you go to the next stop and you look at the plant species closest to the tip of your foot. You look at that one and say, well, that was either light or moderate and make another point and as I said you want to try and get at least ten hits on each of your key species * * *. [8/]

She stated that at least one transect is completed in the "vicinity of the key area, but as I mentioned most of us do a lot of other transects where there are not key areas." Id. 9/

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fn. 7 (continued)
appeal prior to those revisions. Accordingly, references in this opinion are to the 1994 Code of Federal Regulations. We note, however, that the current regulations define utilization as "the portion of forage that has been consumed by livestock, wild horses and burros, wildlife and insects during a specified period." 43 C.F.R. § 4100.0-5 (1998).

8/ The form provides six categories for recording the "Use Rating for the Current Year's Growth." Those categories are No Use (0%), Slight (1%-20%), Light (21%-40%), Moderate (41%-60%), Heavy (61%-80%), and Severe (81%-100%).

9/ Despite this observation, there is testimony in the record that for one of the years that BLM stated that the utilization objective had not been met, 1985-86, BLM performed only four transects on the entire allotment. (Tr. 1000.)

Following completion of the transect, the BLM employee determined the average utilization for each of the key species listed on the form by first multiplying the midpoint of each use rating by the number of hits. Second, if more than one use rating were used for a species, those figures for each use rating were then totaled and divided by the total number of hits to yield the average utilization per species. (Tr. 417; Ex. JJ.) 10/

In the office, BLM used the transect forms to compile use pattern maps for the allotment for the "following grazing years: 3/92 (grazing year 1991-92), 3/91 (grazing year 1990-91), 3/90 (grazing year 1989-90), 3/89 (grazing year 1988-89), 9/85 (grazing year 1985-86)." (Allotment Evaluation at 11; see Ex. N, Maps 5-9; Ex. NN, Maps 5-9 (color-coded)). Beetch explained that in doing so only the key species with the highest level of utilization on each transect was used to make the maps. 11/ "We used the key species that had the highest percentage at each transect, yes. That's [sic] shows where the grazing utilization problem is." (Tr. 583.)

Thus, rather than totaling the average utilization for each key species at a transect and dividing by the number of key species to obtain an average utilization for all the key species at a transect, BLM selected the one species showing the highest utilization average on each transect. The utilization averages for all other key species on each transect were ignored.

Taking those highest utilization averages per transect, BLM plotted the maps to show all the contiguous acreage reflecting the same use category in three new categories: Heavy (61%-100%), Moderate (41%-60%), and Light (1%-40%). 12/ (Allotment Evaluation at 13.) It then took the highest utilization averages for each transect in the Heavy and Moderate categories, added those together, and divided by the number of transects in that contiguous acreage to arrive at the average utilization, which it expressed as a percentage and entered on the maps. (Allotment Evaluation at 13.)

10/ In their post-hearing opening brief, the Ranches expressly stated at page 20 that they "did not necessarily dispute" the actual on-ground process described above, which they termed the "first process." However, they stated that "the fallacy of BLM's conclusions began in what was noted above as the second process; that is, when BLM returned to the office with their on-the-ground utilization Forms and began making the use pattern maps and selectively using the information to determine the 'average' utilization." (Opening Brief at 22.)

11/ Beetch prepared only one original use pattern map, the map for grazing year 1991-92, for which she personally collected part of the transect data. (Tr. 493.) However, she prepared each of the use pattern maps included in the Allotment Evaluation from the original use pattern maps using a computerized system called Geographic Information Systems or GIS, which allowed her to more accurately portray the acreage in the particular use categories. (Tr. 493-500.)

12/ Those six categories of use are found, as noted above, on the Range Utilization Key Forage Plant Method form. On the use pattern maps those six categories were compressed to three: Heavy, Moderate, and Light.

For example, in calculating the percent weighted average utilization for the 1991-92 grazing year, the use pattern map showed 60,282 acres in the Heavy/Severe category and the average utilization percentage stated for those acres was 82%. However, 82% is not the average utilization of all of the key species in that area, or of any particular key species.

Following completion of the use pattern maps, Beetch prepared the "Cottonwood Utilization Calculations," Appendix B1 to the Allotment Evaluation. For each use pattern map, Beetch multiplied the number of acres in the Heavy category times the average utilization for that category, added that to the acres in the Moderate category times the average utilization for that category, and divided that total by the number of acres in those two categories, the result being the percent weighted average utilization. (Tr. 602-603.) Those figures were 78% for the 1991-92 use pattern map, 56% for the 1990-91 use pattern map, 52% for the 1989-90 use pattern map, 62% for the 1988-89 use pattern map, and 76% for the 1985-86 use pattern map. Beetch then added those percentages, divided by five, and reached an average utilization of 65% for all five maps. In her calculations for each map, Beetch excluded all acreage receiving utilization of less than 41%. (Tr. 607.)

The Area Manager relied on Beetch's calculations in Appendix B1 to conclude in the FMUD that the utilization objective of the LUP/RPS of 60% had "only partially been met", i.e. only in grazing years 1989-90 and 1990-91 were utilization levels less than 60%. FMUD at 17.

The Ranches argued before Judge Heffernan that the above-described process did not disclose the utilization of any particular key species or show the utilization of all the key species, but instead focused only on the heaviest utilization of any key species, regardless of the relative incidence of that particular plant or proportion of the plant evidencing that degree of use within the observed plant community. Judge Heffernan accepted the Ranches argument, concluding that "[a]ppellants proved unequivocally that the utilization percentages stated at Appendix B-1 were factually erroneous * * *." (Decision at 7.) He found those percentages to be

> unreasonably skewed toward the highest utilization. This skewing of the data was unreasonable because it did not, and could not, reflect the actual, historic condition of the allotment. While the key forage method of measuring vegetative utilization is intended to reflect the actual, overall historic condition of the range (ALJ Ex. 5), BLM misapplied the method in a manner which could only lead to clearly erroneous results.

(Decision at 9.)

[2] On appeal, BLM contends that Beetch "testified that she followed BLM policy and procedures in her collection of data and calculations of data." (Statement of Reasons (SOR) at 3.) At issue in this case, regarding the utilization objective, is BLM's methodology of selecting only the highest plant utilization from each transect and using that to prepare use pattern maps and Appendix B1 of the Allotment Evaluation.

BLM does not cite any particular page of the transcript in support of its statement, nor does it direct our attention to any particular "policy or procedures" followed by Beetch in her calculations. Our review of the transcript reveals that when Beetch was questioned concerning her use of the highest utilized key species in each transect and whether that "conform[ed] to the constraints of the Bureau manual," the following colloquy took place:

> A. Yes, it does.
>
> Q. It does, all right. You know the Bureau manual to that extent?
>
> A. The monitoring book. Yes.
>
> Q. I'm talking about the Bureau manual.
>
> A. I don't know it off the top of my head, no.
>
> Q. Do you know the Nevada monitoring handbook as well?
>
> A. I don't know it off the top of my head, no.
>
> Q. Okay. So your answer is you don't know what it does or not?
>
> A. I would need to refer to the manual.
>
> Q. Before you could answer the question?
>
> A. That's correct.

(Tr. 589.) BLM has not cited any provision of the BLM Manual dictating the use of the highest utilized key species in each transect.

On the other hand, at the hearing the Ranches offered the testimony of Robert N. Schweigert, a former BLM range conservationist in the Winnemucca District, and at the time of the hearing the owner of a natural resources consulting business. (Tr. 991-93; Ex. 32.) He testified that BLM had a rangeland monitoring bulletin (Ex. 34), page 51 of which "prescribes the calculation of a weighted average and that the weighted average would be the result of monitoring smaller areas throughout the allotment and then applying them to the allotment as a whole." (Tr. 999.) 13/

13/ That bulletin, Technical Reference 4400-8, titled "Rangeland Monitoring--Analysis, Interpretation, and Evaluation," shows at page 52 a weighted average utilization formula in which three pastures of 2,000 acres, 3,000 acres, and 3,000 acres show use rates of 70%, 50%, and 30%. The weighted average utilization is calculated by multiplying each acreage by the percentage use rate and dividing the total of those three sums by the total acreage, 8,000 acres. The 30% use rate acreage is not excluded from the calculation.

Schweigert further testified that the portion of the NRMH designated as Ex. 35 at the hearing provided further guidance on utilization measurement. 14/ He stated that in an allotment, such as Cottonwood, where several key species have been identified, paragraph 3 on page 20 (Ex. 35 at 3) would apply. That paragraph states:

> On some kinds of range, the herbage produced consists of a wide variety of species having approximately equal forage value for the kinds of grazing animals and season of use involved. Under these conditions, the significance of key forage species is reduced, and it is practical to judge degree of use on the basis of a mass of vegetation rather than on a key species. For example, safe degree-of-use of mountain meadow sites could be represented by an average use recorded on the portion of the plant community that provides the bulk of the forage.

Schweigert stated that the Cottonwood allotment was not a mountain meadow site, but that several forage species have the same relative forage value. (Tr. 1004.) According to Schweigert, Beetch's use of the highest utilized species did not conform to the NRMH and "it skews the data to the heavy end of the utilization scale." Id. He testified that he reviewed BLM's data for all the transects run for the 1991-92 grazing year and that "just averaging those observations that the Bureau used, the heaviest observation results in a utilization average in the high 70's. However, when you use all of the key species, it results in an average utilization in the local [sic] 50's." Id.

BLM offered no witnesses to rebut Schweigert's testimony regarding its use of the highest utilized species. On cross-examination, Schweigert admitted that the NRMH was not part of the BLM Manual. While the purpose of that questioning was apparently to show that the handbook would not be binding on BLM because it was not part of the Manual, BLM stated on appeal: "The BLM followed the Nevada Rangeland Monitoring Handbook (NRMH), Ex. ALJ 5." (SOR at 4.)

BLM offers no convincing argument on appeal that its use of only the highest utilized species from each transect was a proper methodology to measure the utilization objective of the LUP/RPS. That objective was to ensure that utilization of key species would not exceed 60% by the end of the grazing year. In measuring utilization, BLM identified not less than three key forage species as being present at each key area, with five being listed as key species present at the exclosure. (Allotment Evaluation at 11-12.) However, by selecting only the highest utilized species, regardless of which species that was, from each transect, BLM'S use pattern maps showed only the highest use of any single species in particular areas. 15/ Such an approach did not measure the use of all the key species

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14/ The Ranches provided selected pages of the NRMH as Ex. 35. The entire handbook was made part of the record by Judge Heffernan as ALJ Ex. 5.

15/ We note that for key area FC-3 (the Cottonwood Allotment was previously designated as the Fish Creek Allotment) the Allotment Evaluation at page 11 listed three key species--budsage, shadscale, and bottlebrush

identified by BLM. Thus, absent some reasonable explanation by BLM for its approach, we must conclude that BLM's use pattern maps and its calculations in Appendix B1 of the Allotment Evaluation, which are based on those use pattern maps, do not support the Area Manager's conclusion that the LUP/RPS utilization objective was not being met on the Cottonwood Allotment for the grazing years 1985-86, 1988-89, and 1991-92. Accordingly, that conclusion is properly set aside as arbitrary and capricious.

2. Ecological Condition and Trend

We turn now to the other two objectives listed at page 3 of the Allotment Evaluation under the heading: "Vegetation and Ecological Condition":

> 2) In the long term, improve 7,952 acres to good condition, and 2,014 acres to excellent condition.
>
> 3) In the long term, stop downward trend on 10,603 acres, and manage for upward trend on 10,762.

BLM asserts on appeal that it correctly determined that those two objectives, described as ecological condition and trend, respectively, were not being met.

[3] Ecological condition or status is the present state of the vegetation of a particular site in relation to the potential natural community for that site. West Cow Creek Permittees v. BLM, 142 IBLA 224, 238 (1998); see Tr. 530-31. BLM collected ecological site data at four key areas and inside and outside the exclosure in August 1993. BLM assigned condition ratings to each site. It rated two sites and outside the exclosure as mid-seral, two sites as late seral, and inside the exclosure as potential natural community. (Allotment Evaluation at 15.) Beetch testified that BLM presently uses seral stages to identify range condition, those stages being early seral, mid-seral, late seral, and potential natural community, and that those stages equate to poor, fair, good, and excellent in the system used at the time of the development of the LUP/RPS objective. (Tr. 530, 540.) Beetch acknowledged that in order to know whether certain acreage had changed class, one would need to know the past condition of the acreage, as well as the present condition. However, she admitted that she had not found any data concerning the condition at the time of the LUP of any particular acreage in the allotment. (Tr. 541.) Thus, no baseline data existed to which the August 1993 data could be compared.

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fn. 15 (continued)
squirreltail. Utilization data was collected from FC-3 only during March 1992. The percentage utilization figures for FC-3 for March 1992 on page 12 of the Allotment Evaluation show percentages for budsage (31%), shadscale (19%), and bottlebrush squirreltail (68%). However, also included is a percentage for Indian ricegrass (90%). If BLM used the 90% figure in its use pattern map calculations, it did so even though Indian ricegrass is not listed as a key species for the FC-3 key area.

Accordingly, the Area Manager erred in concluding that the ecological condition objective to improve 7,952 acres to good condition, and 2,014 acres to excellent condition, in the long term, had not been met. It is impossible to judge whether the ecological condition objective had been met in the absence of baseline information on particular acreage, which is not present in the case record.

Despite that lack of data, Beetch believed that the trend data in the Allotment Evaluation supported a finding that the ecological condition objective had not been met, even though she admitted that the assessment of trend involves a completely different process than the assessment of condition. (Tr. 537-38; 542.)

Beetch defined trend as "a direction change of ecological status over time." (Tr. 544.) The LUP/RPS objective for trend, as set forth in the Allotment Evaluation at 3, was to stop the downward trend on 10,603 acres, and manage for upward trend on 10,762 acres. In order to measure trend, BLM conducted field examinations to determine the frequency of occurrence of certain key species at one key area in 1981 and 1993 and at the exclosure in 1979, 1984, and 1993. Beetch explained that the number of plants were counted, percentages were derived, and, upon subsequent examination, if the percentages increased, the trend was up, if they declined the trend was down, and if they remained the same, the trend was static. (Tr. 544-45.) BLM concluded in the Allotment Evaluation at page 14 that trend was not improving at either the key area or outside the exclosure.

However, BLM did not provide any evidence establishing which 10,603 acres of the allotment were in a downward trend at the time of establishment of the objective or what acreage of the allotment was to be managed for an upward trend. In addition, when Beetch was questioned whether change in the percentage of a key species (shadscale) from 20.5% in 1981 to 16.5% in 1993 at the key area was statistically significant, she responded: "You don't need statistics to say that going from 20.5 to 16.5 is declining." (Tr. 560.)

Jack Alexander, an employee of a natural resources and engineering consulting firm, testified for the Ranches that ecological condition cannot be determined from an examination of trend of frequency. (Tr. 838-39.) After explaining the process involved in a frequency study and referring to an excerpt from BLM Technical Reference Bulletin 4400-7, "Rangeland Monitoring - Analysis, Interpretation and Evaluation" (Ex. 11), relating to confidence intervals for frequency studies, Alexander testified, as follows:

> Q. Now going back to shadscale and looking at the confidence interval between the frequency data in 1981 and the frequency data [in] 1993 and tell the Judge what that means.
>
> A. The mere difference between these two numbers is not significantly meaningful and what it means is that there is [a] static trend for shadscale at this site between the two years, because the confidence intervals overlap from 16 to 19 percent. Therefore there is no significantly statistical valid difference between these two numbers.

Q. So there's no question, looking at shadscale on the first page of Exhibit 10, between 1981 and 1993 that there has been a decline from 20.5 to 16.5; is that correct?

A. Correct.

Q. But in applying the BLM manual to the next step in making the comparison, you apply the confidence interval?

A. Correct. These number[s] are taken from a very small sample area that is intended to represent a very large portion of rangeland. Therefore, the BLM has chosen to apply statistically, statistics to these numbers to determine if that difference is due simply to sampling error or if it has a meaningful, mathematically meaningful, difference.

(Tr. 851-52 (emphasis added).)

After reviewing the testimony regarding trend, Judge Heffernan concluded:

Another serious flaw in BLM's evaluation and assessment of its monitoring data involved its failure to employ statistical adjustment to certain data. The Bureau's own manuals, Rangeland Monitoring-Statistical Considerations (Ex. 33), and Rangeland Monitoring-Analysis, Interpretation and Evaluation, (Ex. 34), provide that where monitoring data is limited in scope, perhaps because of budgetary or personnel limitations, the resulting data from small or limited sites should be statistically adjusted or weighted, in order to be applied to, and to be more representative of, a large land mass. In this case, particularly with respect to the collection of trend of frequency data, the sites were very limited and arguably not representative of the total 99,000 acre allotment, without a compensating statistical adjustment.

(Decision at 10.)

[4] On appeal, BLM asserts that statistical adjustments are not required for trend data. It argues:

The BLM manuals do not require the BLM to run statistics on trend data. The NRMH, Ex. ALJ 5, identifies statistical analysis for trend, but there is no requirement to use it, and professional judgment must be used to interpret the available data and reach conclusions based upon the best available data. BLM manuals are guidelines for the BLM to follow but do not state specifically that the BLM will run statistics on trend data.

(SOR at 6.)

We must reject BLM's argument. BLM states that it followed the NRMH in the monitoring undertaken in this case. The handbook consists of recommended procedures for, inter alia, "collecting frequency trend data." ALJ Ex. 5 at 2. The frequency trend procedures are detailed in Appendix 4 of the NRMH. Id. at 27-31. One of those procedures is listed as "Statistical analysis of frequency trend data." Id. at 30. Statistical procedures to evaluate trend data are also described in BLM's Technical Reference Bulletin 4400-8. (Ex. 33.) The Ranches provided convincing evidence that no legitimate conclusions could be reached regarding trend based on the limited nature of BLM's frequency data, absent the application of statistics. In the face of that evidence, BLM has offered nothing to support its failure to apply statistical analysis to its data other than its bald assertion that it is not required to do so, which is coupled with Beetch's testimony indicating a lack of understanding that the numbers themselves represent the product of a sampling technique and are thus subject to a margin of error when used to represent the condition of the allotment.

While the NRMH states that it includes only "recommended procedures," which should be considered as a "standard approach for monitoring," it also expressly states that its recommendations "should not preclude the use of different or additional methods where resource conditions or values dictate." (NRMH at i.) The problem in this case is that BLM failed to provide any explanation for why, in its "professional judgment," statistical analysis of its frequency trend data was unnecessary. While there is no doubt that BLM may adopt "different or additional methods," it must, if challenged, be able to provide a rational explanation for its methodology. In this case, it has failed to do so.

We must conclude that the record in this case regarding trend provides no rational basis for concluding, as the Area Manager did at page 7 of the FMUD, that "this objective to stop downward trend on 10,603 acres, and manage for upward trend on 10,762 acres, in the long term, has not been met." Likewise, we must reject Beetch's assertion at the hearing that the trend data supports the Allotment Evaluation's conclusions concerning ecological condition.

B. Livestock Use Objective

Turning to the livestock use objective, the RPS states that the short term objective is to manage use at 5,238 AUM's and in the long term for 5,762 AUM's. (Ex. M at 76.) At page 18 of the Allotment Evaluation, BLM stated:

> b) Livestock Use:
>
> 1) The vegetation objectives have not been met when the average actual livestock use for the years 1985-1992 was 4,524 AUMs, therefore the LUP/RPS objective for the short term use at 5,238 AUMs has not been met.

2) Long term use at 5,762 AUMs has not been met, therefore this objective has not been met.

The Area Manager repeated this language unchanged in the FMUD at 7.

When questioned at the hearing whether anything other than the actual use figures resulted in the conclusion that the livestock objective had not been met, Beetch directed attention to the above-quoted language from page 18 of the Allotment Evaluation. The following exchange then took place between Beetch and counsel for the Ranches:

> Q. So that's why I'm going to ask you, your underlying assumption then on page 18 at B-1 is that the reason why the livestock use was not at the level projected in the land use plan was because the vegetative objectives had not been achieved; is that correct?
>
> A. I think it's both, sir.
>
> Q. Think it's both what?
>
> A. Both the vegetation and the actual use. The actual use numbers used for those years of the evaluation.
>
> Q. Well, there isn't any question about the fact that the actual use number[s] for those years were not what the land use plan projected.
>
> A. That's correct.
>
> Q. But how do you then take the next step in saying that the reason that it is true is because the vegetative objective had not been achieved? How do you take that jump?
>
> A. Because there was not enough forage available on the allotment to sustain the full number of AUMs in the short - and long-term.

(Tr. 522-23.)

Therefore, BLM's reasoning was that the actual use figures declined as a result of a decline in the available forage. However, the Ranches offered testimony that actual use declined at the time Paris gained control of the grazing preference not because of a lack of forage, but because Paris did not own sufficient cattle to utilize the entire grazing preference. See Tr. 919-30.

Judge Heffernan relied on the Ranches' evidence in finding that "BLM did not have adequate knowledge of the circumstances of its new permittee or the actual reasons for the decline in actual use following the retirement of the Filippinis in 1989. Consequently, BLM's findings and conclusion that the livestock objective was not met was factually erroneous and,

therefore, unreasonable under the circumstances." (Decision at 13.) He also found BLM's reliance on a failure to meet vegetative objectives as a basis to conclude that the livestock use objective had not been met to be "factually unsubstantiated." Id.

On appeal, BLM complains that Judge Heffernan "erroneously interpreted this objective to conclude that full levels (or the maximum amount of permitted livestock) must be allowed on the allotment, without regard to the sustainability of the vegetative resources * * *." (SOR at 7.) BLM asserts that "[u]nder Judge Heffernan's approach, the ranchers should just be allowed to graze until there is nothing left but dirt, without regard to scientific range principles * * *." Id. at 8.

We believe that BLM is mistaken regarding the impact of Judge Heffernan's decision. Judge Heffernan did not erroneously interpret the livestock objective. If Paris did not graze at the level of AUM's stated as an objective in the plan, the objective may not have been met in a technical sense, but BLM's reliance on that finding as a basis for reducing active use for cattle appears to have been based on Beetch's erroneous impression that the level of grazing was indicative of the ecological condition of the allotment. Judge Heffernan's holding was clearly animated by the need to correct Beetch's error. BLM has not established any error in that holding.

C. Season of Use

In the FMUD at page 10, the Area Manager changed the season of use for cattle from May 1 through February 28 to September 1 to February 28. The Area Manager explained that the change in season of use, as well as the closure of the Cottonwood Basin to grazing, would "provide the necessary rest for the vegetation during the critical growth periods of the key species, will provide protection of the sage grouse brood rearing areas in the upper Cottonwood Basin, and will allow the LUP/RPS multiple use objectives to be met." (FMUD at 13.)

In his decision, Judge Heffernan set aside the Area Manager's determination to change the season of use for cattle. He stated that "the basis for the shortening of the grazing season is not specified in relation to the objectives of the land use plan." (Decision at 14.) The Judge first cited the LUP/RPS objective to provide key forage plants with adequate rest from grazing during critical growth periods. He then cited 43 C.F.R. § 4130.6-3 (1994), which allows modification of the terms and conditions of grazing permits and leases "if monitoring data show that present grazing use is not meeting the land use plan or management objectives." Judge Heffernan found that "BLM has made no such showing that the key species were not receiving 'adequate' rest with the previously permitted commencement of the grazing season on May 1 of each year." (Decision at 14.)

On appeal, BLM asserts that it changed the season of use to allow the key forage species adequate rest during critical growth seasons. It contends that the later turnout date would provide "more secondary cover for nesting and brood rearing for sage grouse and chukars." (SOR at 8.) BLM's

arguments are unaccompanied by any citation to the hearing record or case record. We can find no reference in the hearing record to a lack of "secondary cover" or for the need to delay the turnout date to improve secondary cover. However, the Allotment Evaluation does contain the following explanation at page 22 for its recommendation to change the season of use:

> Cottonwood allotment is primarily a winter grazing allotment, composed primarily of the shadscale/budsage and winterfat communities. Spring and summer grazing has been detrimental to the native grass and shrub species. Native seed sources, particularly in the grass species, are low to almost non-existent on many areas of the allotment. Changing the season of use for cattle to fall/winter use should allow the grass and shrub species adequate time to complete growth cycles, store up necessary root reserves, increase seed production and seed dissemination, increase plant vigor, and potentially help to re-establish in some of the disturbed areas of the allotment. The BLM has also received complaints that no forage is left for the sheep operator [Ellison Ranching], by the time he arrives with his sheep. This recommended change in season of use would ensure that enough forage is left for the sheep operator.

Schweigert testified for the Ranches that the critical growth period on the Cottonwood Allotment would be March and April, and in his opinion, it would not be necessary to defer the season of use until September 1 in order to satisfy the objectives for the critical growth period. (Tr. 1054.) He stated that the utilization that occurs does not occur all at once, which allows plants "to set seed, to complete their growth cycles and to adequately reproduce and put nutrients back into the root reserves for initiation of growth for the next spring." (Tr. 1054.) He referred to use pattern maps compiled by BLM for 1986 and 1987 based on data collected "around the end of June" of each of those years showing only slight utilization to support his position that utilization does not occur all at once. In addition, he testified concerning the benefits to the critical growth period of a deferred rotation grazing management system, as proposed by Paris. (Tr. 1050-53; see Allotment Evaluation at 21.)

The Allotment Evaluation states at page 22 that the Cottonwood Allot-ment is composed primarily of the shadscale/budsage and winterfat communities. On page 5 of that evaluation, shadscale, budsage, and winterfat are each identified as key scrub forage species, while on page 11, BLM provides the list of key forage species by key area. Shadscale is listed as a key species at four of the six key areas and at the exclosure, budsage is listed as a key species at five of the key areas and at the exclosure, and winterfat is noted as a key species at only one key area and at the exclosure. The Allotment Evaluation's justification for changing season of use for cattle is that "spring and summer grazing has been detrimental to the native grass and shrub species." While BLM's percentage utilization figures on pages 11 and 12 of the Allotment Evaluation do reflect heavy utilization of key grass species, that is not true of the key shrub forage species. For example, for the two key areas for which data was collected in only March 1992, utilization percentages for shadscale are 11% and 19%,

while the percentages for budsage are 28% and 31%. Winterfat is not a key species at either of those two areas. At the one key area where winterfat is a key species, the Allotment Evaluation shows utilization percentages for five grazing years and in three of those years the percentage is less than 60%.

We conclude that the case record fails to provide a rational basis for changing the season of use from May 1 through February 28 to September 1 through February 28, particularly in light of the fact that the Ranches offered a deferred rotation plan (Exs. 26 and 27) to address critical growth period concerns. Although in the Allotment Evaluation at page 25 BLM recommended against adoption of the Ranches' first such proposal, the Ranches thereafter submitted a second proposal in June 1994. 16/ Bert Paris testified that BLM never responded to the second proposal. (Tr. 935-36.)

D. Wildlife Objectives

In the FMUD at pages 7-9, the Area Manager concluded that four wildlife objectives set forth in the LUP/RPS had not been met. However, in that part of the FMUD titled "WILDLIFE MANAGEMENT DECISION," he concluded that "no wildlife management decision is necessary. Wildlife will be managed at the long-term objective of 527 AUMs." (FMUD at 16.) Although Judge Heffernan in his decision addressed all the Area Manager's conclusions regarding the wildlife objectives, the only part of the FMUD before him was the Livestock Grazing Management Decision because that is what was appealed by the Ranches and received Hearings Division Docket No. N6-94-27. On appeal, BLM challenges all Judge Heffernan's rulings regarding wildlife objectives; however, we will consider only those wildlife conclusions of the Area Manager and rulings of Judge Heffernan that relate to the Livestock Grazing Management Decision.

The Area Manager concluded that the objective to maintain or enhance sage grouse strutting and nesting areas in conformance with other objective of the RMP had not been met. (FMUD at 7; see Allotment Evaluation at 3.) This conclusion served as part of the Area Manager's rationale for changing the season of use for cattle and closing the Cottonwood Basin portion of the allotment to grazing.

In his decision, Judge Heffernan stated, citing Tr. 1043-44, that "[t]here is no relevant monitoring or range study evidence in the adminis- trative record with respect to sage grouse." (Decision at 16.) He found

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16/ The Allotment Evaluation at page 25 recommended against the Ranches' proposed division of the allotment into three pastures with 12 miles of fencing. It states: "A fencing project would take a considerable amount of time to initiate and complete (cultural surveys, environmental assessments, etc.), and would not be cost-effective for the permittee(s) or the Bureau." We note, however, that the RPS (Ex. M) at page 76 lists as a planned rangeland improvement project in the Cottonwood Allotment: "12 mi. fence."

that BLM had failed to provide any data to support its conclusion that the sage grouse objective had not been met, despite the fact that 43 C.F.R. § 4130.6-3 (1994) contemplates use of monitoring data to support such a conclusion.

On appeal, BLM asserts that sage grouse "is a species of limited adaptability, both in its diet and habitat needs." It cites three transcript pages (Tr. 633, 638, and 643) in support of this assertion. None is relevant. BLM then devotes several pages of its SOR discussing various wildlife studies regarding sage grouse and concludes that its vegetation utilization studies show that "grass species in many of the sage grouse nesting and brood rearing areas was [sic] not meeting the RMP objectives for vegetation." 17/ (SOR at 12-13.)

In his decision, Judge Heffernan relied on the testimony of Schweigert, who testified that BLM has a "manualized procedure" in a BLM wildlife studies manual, which he believed was the "6600 series," for determining whether rangeland habitat for sage grouse has been maintained or enhanced. (Tr. 1044.) He stated that BLM had not collected any data necessary to perform the analysis. BLM did not seek to rebut this testimony at the hearing or offer as evidence any of the studies it now relies on in its SOR.

Judge Heffernan properly ruled that the record did not support the Area Manager's conclusion on the sage grouse objective. Accordingly, BLM improperly relied on a failure to meet that objective as a basis for changing the season of use for cattle and its closure of the Cottonwood Basin.

In the FMUD, the Area Manager discussed threatened and endangered (T&E) species concluding that the objective to improve and maintain habitat for state listed sensitive species and Federally listed T&E species had not been met. He stated that a Category 2 Candidate species, the ferruginous hawk, which, according to the BLM Manual, is entitled to the same level of protection as a T&E species, was known to inhabit the allotment and "one active ferruginous hawk nest was recorded at Hess Spring in the spring of 1993." (FMUD at 8.) The objective, as it related to the ferruginous hawk, had not been met, he concluded, because the "vegetation objectives have not been met; thus, a continuing supply of prey is not guaranteed. The allotment in an improved state would support more than one resident pair of ferruginous hawks." Id.

The Area Manager utilized this conclusion as a basis for requiring in his Livestock Grazing Management Decision the addition of the following provision in all grazing permits in the Cottonwood Allotment: "Ground

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17/ BLM states at pages 11-12 of its SOR: "Batterson and Morse had determined * * *; Alstatt and Stigar, in their northern Nevada studies, clearly demonstrated * * *; Connelly was able to demonstrate * * *; studies of Savage in Nevada and those of Gray and Pyrah in Idaho clearly demonstrate * * *." None of these studies is further identified by date or source. Moreover, and most importantly, none appears to be part of the record in this case.

cover will be re-established and a minimum of 2" stubble height maintained once establishment occurs, for a five mile radius around Hess Spring." (FMUD at 12.) He explained that such a requirement was needed "to maintain and improve the rodent and lagomorph food supply for the ferruginous hawks nesting there." Id. at 14.

Judge Heffernan was unpersuaded. He reasoned that, because BLM's utilization studies had led to erroneous conclusions regarding the vegetative objectives, BLM could not rely on the failure to meet those objectives as a basis for its conclusion on the ferruginous hawk. He ruled: "These perceived threats to the ferruginous hawk are completely unsubstantiated on the administrative record." (Decision at 16.)

BLM cites the testimony of Wayne King, the Area Manager, at Tr. 762-63 in support of its position on appeal that the administrative record does support the restriction on livestock grazing at Hess Spring in order to protect habitat for the ferruginous hawk. King testified that because of the ferruginous hawk's status as a candidate 2 species, he could not "do anything that will threaten their habitat." (Tr. 763.)

The only reason provided by BLM for extending the T&E objective to the ferruginous hawk was BLM's policy to protect Candidate 2 species in the same fashion as T&E species. The Ranches point out in their answer on appeal that on February 28, 1996, the U.S. Fish and Wildlife Service published an updated list of plant and animal species regarded as candidates for possible addition to the list of T&E species (61 Fed. Reg. 7596-7613 (Feb. 28, 1996)), and that the revised list did not include the ferruginous hawk. The U.S. Fish and Wildlife Service explained:

> The designation of Category 2 species as candidates resulted in confusion about the conservation status of these taxa. To reduce that confusion, and to clarify that the Service does not regard these species as candidates for listing, the Service is discontinuing the designation of Category 2 species as candidates in this notice.

61 Fed. Reg. 7597 (Feb. 28, 1996). Thus, the ferruginous hawk is no longer to be managed with the same level of protection as that provided for T&E species. For that reason alone, protection of the ferruginous hawk cannot serve as a proper basis for imposition of the 5-mile restriction at Hess Spring. Because protection of the ferruginous hawk served as the basis for imposition of the restriction at Hess Spring, there is no rational basis for that restriction in the record, regardless of the condition of the vegetation. 18/

18/ Bert Paris testified that the Hess Spring restriction effectively amounted to a closure of that area, which he estimated to be nearly half the allotment, because of the necessity to maintain the two inch stubble height. (Tr. 946-47.) Following receipt of a copy of the Allotment Evaluation, the Ranches, in a letter to BLM, dated June 3, 1994, disagreed with the claimed condition of the spring, but, nevertheless, proposed a

E. Riparian Objective

[5] After stating that Cottonwood Creek and its tributaries comprised the only major riparian area in the allotment, the Area Manager identified the riparian objective, as follows, at page 5 of the FMUD: "The LUP Maintenance Sheet No. 5, dated 9/30/88, states that 40 acres of aquatic/riparian habitat in the Cottonwood Basin shall be improved to good condition." On page 9 of the FMUD, the Area Manager stated: "Cottonwood Creek is between poor and fair aquatic habitat condition, and the condition has not changed between 1987 (50%) and 1993 (51%), therefore, this objective has not been met." The Area Manager held that no livestock grazing would be allowed in the Cottonwood Basin region until the aquatic/riparian objectives were met. He further stated at page 14 of the FMUD:

> It will be necessary to improve 4.0 miles of aquatic/riparian habitat to good condition on Cottonwood Creek (as measured in accordance with the BLM Manual 6671) and 40 acres of riparian habitat (as stated in the LUP Plan Maintenance Sheet #5) as follows: 10 acres of associated riparian habitat adjacent to Cottonwood Creek and 30 acres of other riparian habitat including numerous springs and wet meadows located at the head of the drainage.

The Ranches established at the hearing, upon cross-examination of Jeffery A. Weeks, BLM Associate District Manager, Battle Mountain District, that the riparian objective applicable to the Cottonwood Allotment was not to improve riparian areas but to prevent decline. (Tr. 293.) Schweigert confirmed that prevention of decline was the appropriate standard. (Tr. 1081.)

In his decision at page 17, Judge Heffernan held that the FMUD had "seriously misstated the pertinent riparian objective from the LUP. The final decision stated the relevant LUP objective to be 'improvement,' whereas, the record proves that the applicable objective was, and is, 'prevention of decline.'" Judge Heffernan set aside the Area Manager's conclusion on the riparian objective.

BLM claims on appeal that the controlling testimony is that of King. It states that King testified that "the table in Plan Maintenance Sheet #5 clearly identifies 40 acres of riparian habitat within the Cottonwood Allotment to be improved to good condition." (SOR at 15.) While it is true that King, indeed, testified, in response to a question whether the wording of the riparian objective appeared on Plan Maintenance Sheet #5, that "I believe that we're covered by that plan maint[enance] sheet," examination of that sheet reveals no support for the position taken by

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fn. 18 (continued)
range improvement consisting of fencing off the spring and piping water to a trough away from the spring. (Tr. 958-59; Ex. 30.) They stated that the work could be completed in less than 2 weeks. (Ex. 30.) Paris testified that, although BLM acknowledged receipt of the letter, it never responded to the substance of their offer. (Tr. 984, 989.)

BLM on appeal. That sheet (Ex. L) contains, on page 1, a section designated as "CHANGE" in which the author is to "[d]escribe exactly what is to be deleted, added, rewritten, etc." Handwritten in that section is:

> Add a table which displays, by allotment, the number of riparian acres (total); number of riparian acres associated with streams as part of the short & long term objectives for aquatic habitat improvement; and the number of "other riparian" acreages to be improved in the short & long term, by allotment. (See Table titled "Riparian Objective Acreage")

Page 2 of Ex. L is a table titled as "Shoshone-Eureka Resource Area Riparian Objective Acreage by Allotment." It contains six columns designated: allotment, total, short-term associated with streams, short-term other, long-term associated with streams, long-term other, and "[e]xtra." The acreage listed in the latter four columns is added and included in the total column for each allotment. The Cottonwood Allotment shows 40 acres in the extra column and 40 acres total. There is no explanation on the sheet of what is meant by the term "extra," but there is no indication on the sheet that acreage designated as "extra" is to be improved to good condition.

Thus, King's testimony, when compared to Plan Maintenance Sheet No. 5, does not support adoption of the riparian objective, as he stated in the FMUD.

BLM also claims that it relied on its "Riparian Area Management Policy," dated January 22, 1987 (Ex. E), in announcing the objective. That policy is "to maintain, restore, or improve riparian values to achieve a healthy and productive ecological condition for maximum long-term benefits." Id. This policy does not dictate an improvement to good condition for 40 acres in the Cottonwood Allotment. Maintenance of the condition, which the monitoring data shows, would comply with the policy.

We conclude that BLM applied an incorrect riparian objective. Accordingly, its conclusion that the objective had not been met does not support its action in closing the Cottonwood Basin to livestock grazing, and Judge Heffernan correctly set aside that action.

F. Miscellaneous Arguments

In its SOR, BLM also argues, in effect, that the Area Manager properly put the Livestock Grazing Management Decision of the FMUD into full force and effect. As set forth above, Judge Heffernan correctly set aside the Livestock Grazing Management Decision of the FMUD based on the record in this case. Accordingly, the propriety of placing that decision into full force and effect is moot.

Finally, BLM raises several arguments that do not attempt to address specific alleged errors in Judge Heffernan's decision, but, instead, rely on previous Board decisions as a basis for justifying its actions in this case. First, BLM alleges that the opinions offered by the Ranches' expert witnesses were merely differences of opinion with BLM's experts, and in such cases, the Board resolves those differences in BLM's favor. However,

it then shifts its argument to contend that the issues raised by the Ranches' witnesses concern the methodology used by BLM, which it asserts, "was within the instructions given the BLM in its Manual or otherwise" and "is not even a matter of opinion; it is a matter of interpretation of the clear language of the documents involved." (SOR at 21.)

Second, BLM appears to argue that because the Board has upheld a number of BLM actions "to remove wild horses or to remove wild horses and cattle," it should do the same in this case. It cites as "[p]erhaps the most instructive case," Animal Protection Institute of America, 128 IBLA 150 (1994), in which the Board affirmed and adopted a decision by Administrative Law Judge John Rampton affirming a decision issued by Area Manager King to make proportionate reductions in livestock and wild horses in the Manhattan Mountain Allotment. BLM's position is that the same methodology attacked in this case was utilized in the Animal Protection case. It also cites the decision of Administrative Law Judge Ramon Child in Nevada Division of Wildlife v. BLM, N2-93-14 (Nov. 22, 1995), upholding a decision by the Sonoma-Gerlach Resource Area Manager, BLM, establishing the carrying capacity for the Buffalo Hills Allotment and apportioning the carrying capacity between livestock and wild horses, in further support of its position.

Third, BLM relies on the standard of review announced by the Board for reviewing decisions concerning grazing preference, as set forth in Yardley v. BLM, 123 IBLA 80, 90 (1992), i.e., a BLM decision concerning grazing preference may be considered to be arbitrary, capricious, or inequitable only where it is not supported by any rational basis, and argues that the Ranches have failed to substantiate their attacks on BLM's methodology.

[6] We reject all of these arguments by BLM. While it is true that on numerous occasions the Board has dismissed an appellant's argument as a mere difference of opinion with BLM's experts, it has never been the practice of this Board to accept the conclusory opinions of BLM's experts as a proper basis for a decision in the face of conflicting testimony. What BLM failed to address at the hearing, and what it has continued to fail to recognize on appeal, is the meticulous dissection by the Ranches of its case presented at the hearing.

When BLM's methodology was challenged by the Ranches, BLM did not offer a single rebuttal witness to establish the basis for its actions in this case. While on the one hand BLM argues that it followed established procedures in this case, on the other hand, it asserts that it is not required to follow other established procedures. In view of the absence of any attempt by BLM to explain the departures from those procedures in this case, it appears to be implicit in BLM's argument that its experts have no obligation even to explain why a particular method or procedure was disregarded. The complete lack of any explanation why BLM failed to adjust data used to establish trend in ecological condition by applying statistical confidence intervals is but one example.

The Animal Protection case, cited above, does not dictate a different result in this case. The issues in that case, which are completely different than those raised in the present case, were whether the appropriate management level for wild horses had been established by law and whether

the regulation authorizing the 5-year phase-in period for livestock reductions, 43 C.F.R. § 4110.3-3(a) (1992), was valid. 128 IBLA at 154. In addition, Judge Child's decision in Nevada Division of Wildlife is not a final agency decision and, therefore, has no precedential value. While the Board affirmed that decision in Nevada Division of Wildlife v. BLM, 145 IBLA 237 (1998), there is no indication in that case that BLM engaged in selecting the highest utilized forage species from each transect in developing use pattern maps, the practice challenged by the Ranches in this case and the practice for which BLM offered no reasonable explanation. 19/

The procedural regulations governing appeals to an administrative law judge from BLM grazing decisions provide that "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceedings, shall constitute the exclusive record for decision." 43 C.F.R. § 4.478(a). Judge Heffernan decided this case on the basis of the record made at the hearing and the pleadings filed with him. He applied the applicable burden and concluded that the record did not support the Area Manager's Livestock Grazing Management Decision, and he set that decision aside. On appeal, BLM has provided no basis for overturning that action.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

_____
John H. Kelly
Administrative Judge

_____
19/ In that decision at 145 IBLA 243, the Board quoted from Judge Child's description of the methodology used by BLM in that case:

"In order to determine weighted average utilization, the BLM used 'use pattern mapping' to determine the areas of various utilization classes on the allotment, i.e., no apparent use, slight, light, moderate, heavy, and severe. Once the BLM calculated acreage for each utilization class, it averaged the moderate and the heavy classes to get the weighted average utilization. BLM did not include the no apparent, slight, and light utilization classes in the calculations, nor did it include the severe class, because it decided that using all the use categories would distort the result."
(Citations to transcript and exhibits omitted.)

BLM did not use the same methodology in this case. Here, it included the severe category in its weighted average utilization, which is the position that was espoused by the Nevada Division of Wildlife. These differences in methodology highlight the necessity for BLM to explain clearly the basis for its methodology in each case and to be prepared to defend it when challenged in an appeal.